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Supreme Court of the United States

October Term, 1979.

No. 79-565.

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal From the Court of Appeals of the State of New York.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

Mobil Corporation ("Mobil") respectfully submits this brief *amicus curiae* [1] urging the Court to reverse the decision of the Court of Appeals of the State of New York, which sustained the Order of the Public Service Commission of the State of New York prohibiting promotional advertising by private, investor-owned electric utilities in New York.

1. Pursuant to Rule 42(2), there have been lodged with the Clerk the written consents of counsel for Central Hudson Gas & Electric Corporation, appellant, and of counsel for the Public Service Commission of the State of New York, appellee, to the filing of this Brief *Amicus Curiae*.

THE INTEREST OF MOBIL CORPORATION.

This case concerns direct interference by the State of New York with First Amendment-protected speech in the form of promotional advertising by private investor-owned utilities. The governmental ban on promotional advertising involved in this case abridges not only the right of expression but the right of prospective and existing residential, commercial and industrial customers for electric service to a free flow of truthful information concerning the availability, pricing and advantages of this service.

Mobil is a Delaware corporation which is principally engaged in business in the United States and international energy industries. Its wholly owned subsidiary, Mobil Oil Corporation ("Mobil Oil"), conducts an integrated international energy business including the exploration, production, transportation, refining and marketing of petroleum, petrochemicals, natural gas and products thereof. The petroleum industry in the United States is currently subject to extensive governmental regulation including price and allocation controls on crude oil and certain refinery products. In 1978, Congress enacted the Natural Gas Policy Act, 15 U. S. C. §§ 3301-3432 and 42 U. S. C. § 7255, which placed price controls on intrastate sales of natural gas that had theretofore been exempt from such control. In addition, under the authority of the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §§ 751 *et seq.*, and the Economic Stabilization Act of 1970, as amended, 15 U. S. C. § 1026, the Department of Energy and its predecessors have promulgated regulations which place pricing restrictions on refiners of petroleum products, 12 C. F. R., Part 212, Subpart E. Mobil is also subject to regulations issued by the Wage and Price Council under the Act Establishing the Council of Wage and Price Stability, Pub. L. 93-37 and Executive Order 12092,

November 1, 1978, as amended by Executive Order 12161, October 2, 1979. In addition, several states, including New Mexico, Kansas and Texas,[2] treat operators of intrastate pipelines for intrastate shipment of petroleum as public utilities subject to state regulation.

Mobil has a continuing vital interest in preserving, free from governmental interference and proscription, the established right of a business enterprise to advertise and to promote the sale of its products and to communicate on issues vital to its business with its employees, shareholders, annuitants, creditcardholders, suppliers and contractors. The threat of complete prohibition of information advertising (and particularly advertising addressed to issues) by companies engaged in the energy business—illustrated by the action of the Public Service Commission of New York in this case—threatens vital interests of Mobil, as well as the interests of employees, shareholders, annuitants, creditcardholders, suppliers, contractors and consumers to receive information concerning energy supplies and services.

In the absence of a definitive ruling invalidating the New York proscription of promotional advertising, federal and state regulatory agencies which currently have less restrictive policies may enact similar prohibitory regulations which would disadvantage Mobil and would interfere with the free flow of important commercial information to customers and potential customers for energy in various forms.

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2. N. M. S. A. 70-3-1 *et seq.*; Texas Nat. Res. Code §§ 111.181, 111.183; Kan. Stat. § 55-501.

SUMMARY OF ARGUMENT.

I.

In *West Ohio Gas Co. v. Public Utility Commission of Ohio*, 294 U. S. 63 (1935), the Court recognized the necessity and propriety of public utility advertising and in subsequent decisions has held that advertising by business enterprises is within the ambit of the First Amendment. There is no claim in this case that the Public Service Commission's Order is a mere "time, place and manner restriction." There is no claim that promotional advertisements by electric utilities have been forbidden because they are false or misleading in any way. There is no claim that any transactions proposed in the prohibited advertisements would themselves be illegal in any way. Under these circumstances, the Public Service Commission's Order, a blanket pre-publication injunction against the dissemination of truthful commercial information, is an impermissible prior restraint upon First Amendment-protected communication and is in irreconcilable conflict with the First Amendment.

II.

The Public Service Commission's injunction against dissemination of truthful information concerning the issues surrounding alternatives to oil and coal as sources of energy, including electric service, is not directly supported by any compelling State interest sufficient to override the interests of constitutional dimension which protect the free flow of commercial information to consumers and prospective consumers of electric energy.

ARGUMENT.

I. The Public Service Commission Order Is an Impermissible Prior Restraint Upon the Dissemination of Constitutionally Protected Expression.

This appeal is a challenge to the constitutionality of a broad restraint imposed by a formal Order promulgated by the Public Service Commission of New York upon the communication of commercial information—promotional advertising of electric service—admittedly protected by the First Amendment. The formal Order in question is a pre-publication restraint addressed to private, investor-owned electric public utilities in New York and intended to suppress such constitutionally-protected communication solely because of its content and because of the predicted effect of such communication on the public.

The challenged Order, in relevant part, provides (J. S. App. 31a): [3]

> "All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . . "

The case thus presents, among others, the novel question whether the historic First Amendment prohibition against "prior" or "previous restraints is applicable to invalidate a pre-publication Order preventing the dissemination of truthful commercial information.

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3. References to the "Appendix to Jurisdictional Statement" are abbreviated "J. S. App." herein. The Order also prohibited electric corporations from promoting the use of electricity through the use of subsidy payments not committed prior to the date of the Order and through employee incentives. These aspects of the Order, however, are not challenged in this appeal by appellant, Central Hudson Gas & Electric Corporation.

For the reasons discussed below, it is respectfully submitted that the Order is an impermissible prior restraint and that the judgment of the Court of Appeals of the State of New York upholding the Order should be reversed.

A. Promotional Advertising Is Protected by the First Amendment.

While certain categories of speech such as "fighting words," limited types of obscenity, certain forms of libel and incitement to illegal violence have been held unprotected by the First Amendment, this Court's decisions squarely establish the proposition that truthful advertising enjoys the protection of the First Amendment. *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U. S. 748 (1976); *Bigelow v. Virginia*, 421 U. S. 809 (1975); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

Speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement; speech likewise is protected even though it is carried in a form that is sold for profit and even though it "may involve a solicitation to purchase or otherwise pay or contribute money." *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U. S. 748, 761 (1976); *Buckley v. Valeo*, 424 U. S. 1, 35-39 (1976); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376, 384 (1973); *New York Times Co. v. Sullivan*, 376 U. S. 254, 266 (1964).

The decisions of the Court further establish that a commercial advertisement which is "noneditorial" and merely reports a fact falls within the ambit of protection of the First Amendment. *Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977); *Virginia Board of Pharmacy v.*

Virginia Consumer Council, supra, 425 U. S. at 762; *Bigelow v. Virginia, supra,* 421 U. S. at 822; *Thornhill v. Alabama,* 310 U. S. 88, 102 (1940). Moreover, the circumstance that an advertiser's interest in the dissemination of truthful, factual information to prospective and established customers is a purely economic one "hardly disqualifies him from protection under the First Amendment." *Virginia Board of Pharmacy v. Virginia Consumer Council, supra,* 425 U. S. at 762. The Court has relied on the strong interests of consumers in receiving such information as a basis justifying protection. The Court has noted that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate" and that society has a "strong interest in the free flow of commercial information." 425 U. S. at 763-764. The Court in *Virginia Board of Pharmacy* based this necessary corollary on nothing less than the requirements of a free market economy (425 U. S. at 765):

> "Advertising ° ° ° is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. ° ° ° And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be

> primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal." (Footnote omitted)

This fundamental conception of the nature of the free market system and the conditions essential to its proper operation find support, as well, in the economic basis of the federal antitrust laws. Those laws are designed to protect the free market system from interference to ensure the proper allocation of resources in accordance with the aggregate desires of the people. In contrast, in centrally-controlled economies this process is removed from democratic control and performed by government fiat. As the Court has said, however, the Sherman Act was designed as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," and it "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Company v. United States,* 356 U. S. 1, 4 (1958).

The economic liberty at stake is essential in a democracy based upon a free market economy. Information is essential to that economic liberty:

> "Under certain conditions competitive prices select the goods to be produced and allocate resources to their production in such a manner that there is no way to improve upon either the choice of productive methods by firms, or the distribution of goods that arises from the purchases of households. There exists

> no rearrangement of the resulting economic configuration that makes one household better off (in view of its preferences) without making another worse off. No further mutually advantageous trades are possible; nor are there any feasible productive processes that will yield more of some desired commodity without requiring a cutback in another. For if this were not so, the situation of some individuals could be made more advantageous without a loss for anyone else. The theory of general equilibrium explains how, given the appropriate conditions, the information supplied by prices leads economic agents to act in ways that sum up to achieve this efficiency. Of course, the requisite conditions are highly special ones and they are seldom if ever fully satisfied in the real world. Moreover, *market failures and imperfections are often serious, and compensating adjustments must be made by the allocation branch. ° ° ° Monopolistic restrictions, lack of information, external economies and diseconomies, and the like must be recognized and corrected.*[4] (Footnote omitted and emphasis supplied)

In this economic system, lack of information causes market failure. If citizens who decide a political issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, they may, by reason of that interference with the thinking process of the community, reach an ill-considered, ill-balanced decision. In the same way, consumers deprived of relevant commercial information may, by reason of censorship of their sources of information, make unwise, ill-considered economic decisions. Like the democratic political process, the free market system depends upon a free-flow

4. J. Rawls, *A Theory of Justice*, 271-272 (1971).

of information—information about the prices, availability, benefits, advantages, and disadvantages of specific goods and services produced by the economic system. In the absence of accurate, up-to-date commercial information, the market system malfunctions as a mechanism for allocation of limited resources in accordance with the aggregate desires and free economic choices of the people. Indeed, the goal of perfect competition is normally defined by reference to the condition of access to complete information concerning the prices, qualities and availability of goods and services. Areeda, *Antitrust Analysis*, 6-25 (2d ed. 1974).

The importance of the free flow of economic information is reaffirmed in the Court's recent decisions invalidating restrictions on commercial advertising. These decisions establish First Amendment protection for information (including paid written advertising) concerning

(1) prices, discounts, rebates and credit terms, *Virginia Board of Pharmacy v. Virginia Consumer Council, supra; Bates v. State Bar of Arizona*, 433 U. S. 350 (1977);

(2) the location where goods or services may be obtained, *Bigelow v. Virginia, supra;* and

(3) availability for purchase, *Linmark Associates, Inc. v. Willingboro, supra;* and

(4) procedures facilitating purchase of advertised goods or services, *Bigelow v. Virginia supra.*

In *Virginia Board of Pharmacy v. Virginia Consumer, supra,* while recognizing the State's powers to regulate the practice of pharmacy in Virginia in the interest of the safety and welfare of the public, the Court invalidated, on grounds of repugnance to the First Amendment, a portion

of a Virginia regulatory statute providing that a licensed pharmacist in Virginia is guilty of unprofessional conduct if he "publishes, advertises or promotes . . . any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription." The Court affirmed the judgment of a three-judge District Court enjoining enforcement of the statutory provision. The opinion recognizes the right of users of prescription drugs to receive information that pharmacists may wish to communicate to them through advertising and other promotional means concerning the prices of such drugs. In support of the holding that such commercial advertising is protected by the First Amendment, the Court underscored the unquestioned value of such information to consumers of drugs and their legitimate entitlement to unfettered access to commercial information on that subject.

In *Linmark Associates, Inc. v. Willingboro, supra,* the Court invalidated a local township ordinance banning the use of "For Sale" and "Sold" signs in connection with the marketing of homes and residential real estate.

In *Bigelow v. Virginia, supra,* the Court reversed the conviction of a Virginia newspaper editor for publishing information concerning the availability of abortion referral services in New York.

In *Bates v. State Bar of Arizona, supra,* the Court invalidated a rule which made the advertising of the prices of legal services by Arizona lawyers a disciplinary infraction subject to censure.

Information advertising by electric utilities, which is prohibited by Order of the Public Service Commission of New York at issue in this case, is commercial information of precisely the same kind which has received First Amendment protection under the Court's decisions. Consumer

interest in the pricing, availability, advantages, disadvantages and efficient use of alternative energy sources has never been greater than at present. Moreover, the fact that aspects of the operation of electric utilities are subject to state regulation does not lessen the need for information which can be provided only by information advertising. Each of the cases in which the Court has invalidated restrictions on advertising involved the misuse of state regulatory powers in areas of economic activity subject to state regulation. The failure to value the interests of consumers, employees, shareholders, annuitants, creditcardholders, suppliers and contractors, the failure to appreciate the degree of competition between alternative sources of energy, and the concomitant need for accurate information were fundamental flaws in the reasoning of the Court of Appeals of New York below. Thus, the Court of Appeals wrote (J. S. App. 13a):

> "In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in 'informed and reliable' economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping."

However, competition within the regulated sectors of the economy providing alternative sources of energy such as electric power, natural gas, and oil has been recognized by this Court. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 403 (1978). Indeed, in *West Ohio Gas Company v. Public Utilities Commission of Ohio*, 294 U. S. 63 (1935), the Court took judicial notice of competition between electric power, natural gas and oil as the basis for holding that promotional advertising by public

utilities is a proper and necessary activity, the reasonable expenses for which are chargeable to customers for rate-making purposes. Mr. Justice Cardozo wrote (294 U. S. at 72):

> "The suggestion is made that there is no competition. We take judicial notice of the fact that gas is in competition with other forms of fuel, such as oil and electricity. A business never stands still. It either grows or decays. Within the limits of reason, advertising or development expenses to foster normal growth are legitimate charges upon income for rate purposes as for others. Consolidated Gas Co. v. Newton, supra, 267 F. 253. When a business disintegrates, there is damage to the stockholders, but damage also to the customers in the cost or quality of service."

As the Court has acknowledged, the propriety of promotional advertising by public utilities rests, in part, upon that residual competition between alternative sources of energy which is not eliminated even in the regulated environment in which public utilities operate. Moreover, competition between these alternative energy sources, which the Court judicially noticed in the *West Ohio Gas* case, was acknowledged in this case by the Public Service Commission. The Chairman of the Commission, the Honorable Alfred E. Kahn, noted (J. S. App. 49a):

> ". . . I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one

> of whom is free to advertise his wares and the other is—under our present policies—not."

Other commentators have also observed that competition exists, even within the regulated sector, between electric power, oil and natural gas.[5]

The conclusion of the New York Court of Appeals below that promotional advertising of electricity by regulated electric utilities is not protected by the First Amendment *because there is no competition, at least in their respective service areas, among suppliers of electric power* is based upon an excessively narrow view of competition which fails to recognize and preserve existing competition between suppliers of alternative forms of energy. It is totally at odds with decisions of this Court and even with the factual assumptions of the Chairman of the Public Service Commission in this case.

The importance of information advertising as a means of informing actual and potential customers of the rates, availability and advantages of electric energy in comparison with natural gas and oil, is not, therefore, eliminated by the fact that certain aspects of the industry are subject to state regulation. Information advertising is desirable to the extent it helps the public make more intelligent choices between alternatives and advance a utility along its declining cost curve toward lower resultant rates for all. The command of the First Amendment applies, therefore, with equal force to the information advertising at issue in this case as it does to the types of promotional advertising which have previously been held to be protected by the First Amendment.

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5. *See*, Shenefield, "Antitrust Policy Within the Electric Utility Industry," 16 Antitrust Bulletin 681 (1971); Pace, "Relevant Markets and the Nature of Competition in the Electric Utility Industry," 16 Antitrust Bulletin 725 (1971); Landon and Wilson, "An Economic Analysis of Combination Utilities," 17 Antitrust Bulletin 237, 257-260 (1972).

B. The Public Service Commission's Order Operates as an Impermissible Prior Restraint.

The First Amendment prohibition against prior restraints, one of the most venerable absolutes in the field of constitutional law, completely proscribes any direct restraint upon constitutionally-protected speech which operates prior to publication to prevent the dissemination of opinion, thought or information. "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson,* 283 U. S. at 713, 716-717; *Patterson v. Colorado ex rel. Attorney General,* 205 U. S. 454, 462 (1907); *Grosjean v. American Press Co.,* 297 U. S. 233, 249 (1936); *cf. Nebraska Press Association v. Stuart,* 427 U. S. at 588-589 (concurring opinion of Mr. Justice Brennan).

Prior restraints are "the essence of censorship." *Near v. Minnesota ex rel. Olson, supra,* 283 U. S. at 713. The First Amendment, therefore, "accords greater protection against prior restraints than it does against subsequent punishment for particular speech." *Nebraska Press Assn. v. Stuart, supra,* 427 U. S. at 589 (concurring opinion of Mr. Justice Brennan); *Carroll v. Princess Anne,* 393 U. S. 175, 180-181 (1968). As the Court explained in *Southeastern Promotions, Ltd. v. Conrad,* 420 U. S. 546, 559 (1975): "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."

None of the narrow "exceptions" to the prohibition against prior restraints is applicable here. *See, Nebraska*

Press Assn. v. Stuart, supra, 427 U. S. at 590-591 (concurring opinion of Mr. Justice Brennan). Two such "exceptions," noted in the Court's opinion in *Near v. Minnesota ex rel. Olson*—the case of restraints to enforce "the primary requirements of decency" against obscene publications and of "incitement to acts of violence and the overthrow by force of orderly government"—have since been interpreted as examples of "speech" that is not encompassed within the First Amendment. The third "exception" mentioned in *Near,* where speech meriting First Amendment protection might be suppressed in advance of publication because of the requirements of "military security" during times of war, has only been adverted to in dictum and has never served as the basis for upholding a prior restraint against publication of constitutionally protected materials. It is clearly inapplicable in this case.

None of the Court's recent decisions upholding First Amendment protection for advertising has involved the operation of a drastic prior restraint such as the Public Service Commission Order at the heart of this case. *Bigelow* involved a Virginia criminal statute imposing punishments *after* publication of the proscribed advertising. In *Bates* and *Virginia Board of Pharmacy,* the challenged restraints were disciplinary rules carrying *subsequent* sanctions for their violation. *Linmark Associates, Inc.* likewise involved a township ordinance prohibiting erection of "For Sale" and "Sold" signs.

In *Virginia Board of Pharmacy v. Virginia Consumer Council, supra* 425 U. S. at 771 n. 24, the Court intimated that the First Amendment prohibition against prior restraints is equally applicable to advertising except in the case of false advertising. Noting that "the greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear

of silencing the speaker," the Court went on to state (425 U. S. at 772 n. 24):

> "They may also make inapplicable the prohibition against prior restraints. Compare New York Times Co. v. United States, 403 U. S. 713 (1971), with Donaldson v. Read Magazine, 333 U. S. 178, 189-191 (1948); FTC v. Standard Education Society, 302 U. S. 112 (1937); E. F. Drew & Co. v. FTC, 235 F. 2d 735, 739-740 (CA 2d 1956), cert. denied, 352 U. S. 969 (1957)."

The possible exception for *inaccurate* advertising, which the Court in footnote 24 of *Virginia Board of Pharmacy* intimated might be recognized, has no application to this case. Because of the preclusive effect of the Order of the Public Service Commission no promotional advertisement has been published. The truthfulness of proposed promotional advertisement must be presumed. Consequently, the Public Service Commission's Order is a clear and direct violation of the First Amendment's absolute prohibition against prior restraints.

The Order is a broad and general injunction directed, not a specific speech, but at a complete range of expression. As the Court below noted, "[T]his order works a direct curtailment of expressional activity: *an entire category of speech is prohibited because of its potential impact upon the society.*" (J. S. App. 10a). The Order is based on two layers of speculation: (1) speculation concerning the *content* of prospective speech which is banned in general terms; and (2) speculation as to the *consequences* of the speech to the extent its content might influence the public which receives and hears or reads it. Moreover, the constitutional infirmities of this Order by their very nature could not be cured by prompt, intervening judicial

review. Those cases where speech can be promptly reviewed by judicial authority to determine whether it is, for example, obscene and outside the protection of the First Amendment, are therefore inapposite. Here, as in *New York Times Co. v. United States,* 403 U. S. 713 (1971), only actual publication of the speech in question could determine the issue whether the predicted consequences would result.

It is well-settled that any prior restraint bears "a heavy presumption against its constitutional validity." *New York Times Co. v. United States, supra,* 403 U. S. at 714. That burden has not been and cannot be satisfied in this case. The Order is a classic prior restraint upon speech which is clearly within the ambit of protection of the First Amendment. The Public Service Commission's blanket Order banning *all* promotional advertising is based on conclusory predictions of a highly speculative nature, wholly unsupported by any specific evidence, so far as can be determined from the record. The conclusions rest on "factors unknown and unknowable." *Nebraska Press Assn. v. Stuart, supra,* 427 U. S. at 563. No satisfactory showing has been made that promotional advertising is clearly liable to cause any direct and dangerous interference with serious governmental interests.

Moreover, there has been no showing on this record to sustain another aspect of the heavy burden of supporting a prior restraint. No explicit determination has been made and supported that measures short of an order restraining *all* information or issue advertising by electric utilities would not have been sufficient to accomplish the regulatory goal sought to be advanced by silencing the electric utilities in New York. No showing has been made that direct limitation by the Commission on certain new or additional uses of electric service would not have been sufficient to protect the interests said to be jeopardized by

promotional advertising. No showing has been made that rate increases for certain uses or rate increases for service usage during certain times of the day would not have been a satisfactory alternative short of a blanket injunction against *all* promotional advertising. No showing has been made that a ceiling limitation upon expenditures for promotional advertising (if constitutionally permissible) would not have been a satisfactory alternative to *total* prohibition. In short, no showing has been made to eliminate as feasible alternatives to total prohibition less restrictive means of regulation in this area touching the rights to disseminate and to receive truthful information of interest to the public.

For all of these reasons, the Order of the Public Service Commission squarely conflicts with the First Amendment. It is respectfully submitted that the judgment below should be reversed and the Order annulled.

II. No Compelling State Interest Justifies a Total Ban on Promotional Advertising by Electric Utilities.

In *West Ohio Gas Company v. Public Utilities Commission of Ohio*, 294 U. S. 63 (1935), the Court specifically upheld the propriety of promotional advertising of public utility services. The Court held that expenditure of reasonable sums for promotional advertising by utilities was a management prerogative. Moreover, addressing an issue not involved in the present appeal, the Court there held that reasonable expenditures for this purpose may properly be charged to rate-payers for ratemaking purposes. As demonstrated above, such promotional advertising also enjoys the protection of the First Amendment. Arrayed against these interests of substantial constitutional dimension are the insubstantial justifications offered in support of the Order.

The Commission itself has stated that "the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues . . ." (J. S. App. 35a). A principal motivation for the Commission's action in completely halting even these relatively modest expenditures by New York utilities is evidenced by the Commission's comment that "the proper extent and *content* of such advertising . . . is *an increasingly controversial issue.*" (J. S. App. 35a). However, protected speech may not be suppressed simply because various other private interest groups vociferously dissent from the "content" of such advertising. No other compelling state interest supports the total suppression, prior to publication, of *all* forms of "promotional advertising."

In its Opinion upholding a prior restraint on all "promotional advertising" by electric utilities, the New York Court of Appeals adverted to "the present energy crisis" (J. S. App. 13a-14a). Indeed, the Court took *judicial notice* of energy shortages. Based on this lone factual observation, the Court below appears to have reasoned along the following lines:

> 1) "Public utilities . . . have been regulated and franchised to serve the commonwealth" (J. S. App. 13a).
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> 2) "[T]he realities of the situation all but dictate that a utility be granted a monopoly status" and the withdrawal of "the unrestricted right of competition between corporations occupying ° ° ° the public streets ° ° ° and supplying the public with their products or utilities" (J. S. App. 13a).
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> 3) The purpose of regulation is "[t]o protect against abuse of this superior economic position" (J. S. App. 13a).

4) Therefore, electric utilities operate in a "non-competitive market" (J. S. App. 13a).

5) Since there is no competition, each electric utility enjoys a monopoly in its service area; advertising, under these circumstances, cannot aid in product or price competition.

6) Since promotional advertising is ineffectual to shift existing demand from one source of electric power to another, the only other useful function of promotional advertising would be to *create* demand for electric energy where none previously existed.

7) Additional use of electric energy must necessarily be supported by increased generation of electricity, which, in turn, requires consumption by utilities of additional fuel.

8) Fuel shortages and the need to conserve energy resources make additional consumption of fuel for generation of electric power contrary to the public interest.

9) Promotional advertising of electric service would be effective in causing increased consumption of electric power and would therefore lead to a consequence contrary to the public interest.

Placing exclusive reliance on this Court's decision in *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978), the New York Court of Appeals upheld the total ban on promotional advertising by electric utilities.

This argument is a *non sequitur*. Regulation predicated on the need to prevent the abuse of a state-imposed monopoly of a single form of energy within a particular service area here is extended to *suppress* any remaining

competition, including (A) competition between electric utilities located in different geographic service areas for a new industrial customer choosing a site for a new facility, (B) competition between electric utilities and suppliers of *other* forms of energy within the same service area for industrial, residential or commercial customers whose demand is constant and will inevitably be supplied by one source or another, (C) competition between suppliers of different forms of energy in new residential projects, and (D) competition or promotional activities to sell electric service to industrial customers which have the capability to generate their own energy and are faced with the economic decision whether to purchase energy or to generate it themselves by possibly less fuel-efficient methods. The need for conservation of natural resources does not eliminate the occasion for these private economic decisions on the basis of which the allocation of resources in a market system—even one subject in some sections to state regulation—is made. Notwithstanding energy shortages, construction of new homes requiring heating and energy systems continues. Purchase and use of new appliances for food storage and preparation continue. Location and construction of new industrial and commercial facilities continues. The importance of maintaining a free flow of up-to-date and accurate commercial information so that the economic decisions involved in these activities may be well-considered and sound decisions is not diminished by the need to conserve energy. In these circumstances, consumers need truthful information concerning the availability, prices and advantages of electric service and of the competing alternative forms of energy.

Finally, in support of its decision to uphold the Public Service Commission's Order in this case, the Court below relied upon an expansive reading of this Court's decision

last Term in *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978). Essentially, the Court below erroneously read and misapplied *Ohralik* as supporting the proposition that "a particular mode of advertising which would not well serve the social interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned." (J. S. App. 12a).

Ohralik, dealing with in-person solicitation by attorneys, involved the constitutional protection of advertising and promotional activities in the professions—a context which the Court has repeatedly emphasized is unique. *Bigelow v. Virginia, supra*, 421 U. S. at 825 n. 10; *Virginia Board of Pharmacy v. Virginia Consumer Council, supra*, 425 U. S. at 773 n. 25; *Bates v. State Bar of Arizona, supra*, 433 U. S. at 365 n. 17. Moreover, in *Ohralik* the Court was concerned with issues unrelated to paid written advertising and noted the "significant differences" between public advertisements of the type involved in this case and in-person solicitation, 436 U. S. at 457. The in-person solicitation of clients—at the hospital room or the accident site, or in any other situation—breeds undue influence, as the Court observed. In-person solicitation presented dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. None of these dangers is present in this case, where newspaper advertising is banned. Moreover, while in *Ohralik* the in-person solicitation involved speech, speech was only a "subordinate component." 436 U. S. at 457. The Court specifically noted that "[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response without providing an opportunity for comparison or reflection." 436 U. S. at 457. None of these aspects of in-person solicitation is present in this case. Properly con-

sidered in the light of the unique factual circumstances involved in in-person solicitation, the holding of *Ohralik* does not support a blanket prior restraint upon promotional advertising by electric utilities.

Quite apart from interfering with these important functions of utility advertising, the Commission's ban on promotional advertising impedes advertising designed to shift customer usage of electric service from peak-load periods to non-peak-load periods. While Time-of-Day (TOD) pricing of utility service has not yet been uniformly implemented in this country, experience with this new pricing concept in electric utility marketing is sufficient to demonstrate that consumers adequately informed about the nature of this pricing system are responsive to these fuel-saving techniques.[6] The studies of customer responsiveness to time-of-day rates in electric utility pricing underscore "the need for extensive consumer education in the areas of load management and time-of-day rates . . . if we hope to gain customer acceptance."[7] The need for "extensive consumer education" is no less critical where electric utilities such as Central Hudson Gas & Electric Corporation desire to promote off-peak consumption and energy-saving electrical uses and devices, including the heat pump.

The effect of the Commission's Order, however, has been to silence effective communication on these important subjects between electric utilities and their customers in New York.

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6. *See*, Malko and Simpson, "Time-of-Use Pricing in Practice: Some Recent Regulatory Actions," in *Assessing New Pricing Concepts in Public Utilities*, Proceedings of the Institute of Public Utilities, Ninth Annual Conference, 1978 MSU Public Utilities Papers 399 (1978); Kennedy, "Peak Load Pricing and Industrial Consumers' Response," *id.* at 420-429.

7. Holeman, "Mandatory Time of Day Rates: The Arkansas Power & Light Company Experiment," *ibid.* at 430, 440.

There is no claim in this case that the prohibition of information advertising is a mere "time, place and manner" restriction; the prohibition in this case is aimed directly at the content of the communication in question. There is no claim in this case that the advertising is forbidden because it is false or misleading in any way. Nor is there any claim that the transactions proposed in the forbidden advertising are themselves illegal in any way. The special problems of the electronic broadcast media are not implicated in this case.

Here, as in *Virginia Board of Pharmacy v. Virginia Consumer Council, supra,* the question is "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients" and whether that suppression of communication may constitutionally be accomplished by prior restraint.

CONCLUSION.

The Public Service Commission's Order is designed as a form of indirect control over the lawful conduct of residents of New York. The direct purpose of the Order is to prevent the dissemination of truthful information because of its contents. The communication is prohibited because it is believed that its content will be acted upon by recipients, and the effects of those actions are feared and sought to be prevented even though those actions would be lawful. This prior restraint is the keystone of a paternalistic effort by government to keep the people ignorant of facts which are of interest to them as a means of controlling their lawful behavior. The Order is, thus, fundamentally at odds with the First Amendment. While the Public Service Commission may possess the power directly to affect the actions of consumers by proper regu-

lation of the electric utilities subject to its jurisdiction, it is, by the command of the First Amendment, without power to achieve its objectives indirectly by completely banning dissemination of the information and opinion which citizens are entitled to receive.

For these reasons, it is respectfully submitted that the Judgment of the Court of Appeals should be reversed with instructions to annul the Order of the Public Service Commission of the State of New York.

Respectfully submitted,

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